DEC 29
JAMES R. BROWNING

No. 537

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Appeal from the Supreme Court of Ohio

THE SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

MOTION TO DISMISS

WILLIAM SAXBE,
Attorney General,
JOHN M. TOBIN
Assistant Attorney General,
State House, Columbus 15, Ohio
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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MOTION TO DISMISS

Appellee in the above styled case, pursuant to Rule 16 (1) (b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that it does not present a substantial federal question.

STATEMENT OF THE CASE

Following the decision of this Court in *Society for Savings in the City of Cleveland* v. *Bowers, Tax Commissioner*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950, the General Assembly of Ohio was called into special session. On June 29, 1956, Amended House Bill No. 944 was enacted. This

bill was approved by the Governor of Ohio on July 6, 1956, and became effective on October 8, 1956.

This amendment to the Ohio tax structure was a legislative attempt to conform the Ohio laws pertaining to financial institutions to the decision of this Court referred to above. The Sections of the Ohio Revised Code affected by Amended House Bill No. 944 were: Sections 5701.06, 5707.03, 5709.02, 5719.09, 5719.10, 5725.04, 5725.07, 5725.08, 5725.22, and 5725.24.

On the basis of these amended statutes, the Tax Commissioner of Ohio issued an assessment against The Second Federal Savings and Loan Association of Cleveland, an incorporated financial institution without shares of capital stock. Upon review and redetermination of the assessment, the Tax Commissioner affirmed the assessment made upon the ownership interests of the depositors in the capital employed in appellant's financial institution without deduction on account of federal securities owned by appellant.

The Tax Commissioner's determination was affirmed on appeal to the Ohio Board of Tax Appeals. The constitutional question raised by appellant was not passed upon inasmuch as the Board held that it was without authority to determine the constitutionality of an act of the General Assembly.

The Supreme Court of Ohio noting that the pertinent statutes prior to amendment had been considered in *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950, used this Court's decision and the amended forms of the statutes as the foundation for its opinion.

The appellant has filed its jurisdictional statement herein contending that the determination of the Supreme Court of Ohio was erroneous, that the question involved was substantial, and that this Court should accept jurisdiction of this appeal so as to correct the errors of the Ohio Supreme Court.

ARGUMENT

Appellant attempted unsuccessfully to expand the scope of its appeal before the Supreme Court of Ohio. The errors as originally assigned pertained only to a general allegation of unconstitutionality. Appellant's original brief in the Ohio Supreme Court contained a like allegation and its argument was based upon this Court's decision in *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950, plus the claim that the value of its federal securities exceeded its capital.

The questions now claimed presented were first identified in the brief amicus curiae. Appellant then attempted to expand the scope of appeal by filing an amendment and supplement to its assignment of errors. This attempt was opposed by the appellee and disapproved by the Ohio Supreme Court. Likewise, following the decision of the Ohio Supreme Court appellant again attempted an expansion of its appeal by presenting to the Chief Justice of the Ohio Supreme Court a certification of questions raised. This attempt was also refused. Thus the single question properly raised is whether the amended Ohio statutes are improper on the basis of this Court's opinion in *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950.

The appellant at page 9 of its jurisdictional statement states that this appeal is concerned with the constitutionality of statutes of Ohio "which have merely codified or enacted into law former decisions of the Supreme Court of Ohio." This remark is characteristic of appellant's approach to the problem and overlooks the basic tenet of the General Assembly of Ohio. While it is true that a portion of the amended statutes made explicit that which the Supreme Court of Ohio found implicit in the statutes involved

in *Society for Savings* v. *Peck*, 161 Ohio St., 122, 118 N. E. 2d, 651. The basic concern of the General Assembly in the enactment of Amended House Bill No. 944 was to cure the defects identified by this Court in *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950.

Initially it may be observed that under Section 2 of Article XII of the Ohio Constitution the General Assembly has the power to determine the subjects and methods of taxation of personal property limited only by Article I of the Ohio Constitution. *State, ex rel. Struble*, v. *Davis*, 132 Ohio St., 555, 9 N. E. 2d, 684; *State, ex rel. Williams*, v. *Glander*, 148 Ohio St., 188, 74 N. E. 2d, 82. The appellant has made no claim that the assessment against it is contrary to Ohio law or to the Ohio Constitution.

The opinion of the Ohio Supreme Court in *Second Federal Savings & Loan Assn.* v. *Bowers*, 168 Ohio St., 65, states at page 66 that:

> "These statutes, before their amendment, were considered by the Supreme Court of the United States in Society for Savings in the City of Cleveland v. Bowers, Tax Commr., 349 U. S., 143, 99 L. Ed., 950, 75 S. Ct., 607. That court held that the tax as imposed by the then existing statutes on the ownership interests was on *the financial institution itself and not on the depositor*, and that federal securities could not be included in the computation of the capital." (Emphasis added.)

The Ohio Court later observed at pages 67 and 68 of its opinion that:

> "That language indicates an acknowledgment that *the state has the power to tax intangible interests of ownership in an incorporated financial institution without shares of capital stock and use the net worth of the institution as a measure of value for taxation without excluding federal securities* owned by the institution, but indicates that under the then existing statutes it had not done so." (Emphasis added.)

In its opinion in *Society for Savings*, 349 U. S., 145, 75 S. Ct., 607, 99 L. Ed., 950, this Court took especial pains to point out the inadequacies inherent in the Ohio statutes. As observed earlier, the General Assembly of Ohio in special session attempted to correct the defects as identified by this Court. The Supreme Court of Ohio after quoting the crux of this Court's opinion carefully spelled out the correcting features of the amended statutes. The pertinent language of the opinion of the Supreme Court of the United States appears at pages 146 to 154 and reads:

"The Supreme Court of Ohio recognized that this tax, based as it was upon the inclusion of federal obligations, would have to fall if directed against the banks. * * * This Tax, though, was not considered to be against the banks. Holding that the depositors of a mutual savings bank have an interest similar to that of shareholders of other banks, the Ohio court found instead that the tax was imposed upon the "intangible property interests' of the depositors as the owners of each bank. The banks' capital, surplus fund and undivided profits, which we will refer to as their surplus, were regarded as not themselves the subject matter of the tax, but as simply the measure of the tax against the depositors, and the banks were treated as tax-collecting agents rather than as taxpayers.

"In so deciding the Ohio court relied upon a gloss on the rule of immunity stated above. It has been held that a state may impose a tax upon the stockholders' interests in a corporation, measured by corporate asset values, without making any deduction on account of United States securities held by the corporation. * * *

"* * * The statute is barren of any language expressly imposing this tax on the depositors, and contains no provision giving the bank any right to recover the tax from the depositors, as might be expected if the bank had been regarded as a mere tax-collecting agent. * * *

"* * * * * * * * * * *

"We not * * * that should the bank be unable to pay the tax, after it has been assessed, there is no provision entitling the State of Ohio to collect it from the depositors. A tax against the depositors which is recoverable only from the bank looks like a tax against the bank. And if the tax is in fact against the bank, it does not matter whether the ultimate economic impact is passed on to the depositors. * * *

"Next, it appears that the statute does not relieve the bank from having to pay the tax on the 'intangible property interest' of a depositor who had an account with the bank on the assessment date of the tax, but has withdrawn his account before the collection date. And if the bank is required to pay on the former depositor's account, there is no provision entitling the bank to reimbursement from him. It should be observed that in the case of the deposit tax the statute does contain provisions protecting the bank in such a situation.

"Finally, and perhaps most important, if this tax is on the depositors, we must find somewhere a right in the bank to make itself whole from the depositors for the taxes paid on their account. * * *

"* * * * * * * * * * * *

"Without provisions protecting the bank against the burdens of the tax, we cannot assume that the statute's operation will not infringe on the immunity of the federal obligations held by the banks. * * *

"We conclude that this tax is on the depositors in name only, and that for federal purposes it must be held to be on the banks themselves. * * *"

Section 5709.02, Revised Code of Ohio, as amended, expressly subjects to taxation the ownership interests of depositors in incorporated financial institutions without shares in the same manner as shares of stock in incorporated financial institutions having shares.

Sections 5707.03 and 5725.04, Revised Code of Ohio, as amended, expressly provide that the tax herein levied shall be upon the ownership interests of the depositors in capital

employed by financial institutions without shares and not on any property of the corporation, thus making it clear that the tax is not levied upon any property of or belonging to such corporation.

Section 5719.10, Revised Code of Ohio, as amended, supplies specific and complete assurance that the impact of the tax is upon the depositors as of the day the state's lien attaches, January 1, that the impact of the tax will be upon them rather than the financial institution itself, and additionally that persons becoming depositors after January 1 bear no part of the tax for the current year. Financial institutions are given the right to charge the tax to depositors determined as of January 1, the right to deduct the amount thereof from their deposits, interests, or dividends, and a fully enforceable lien upon such deposits, interests and dividends. It therefore appears certain that the financial institution itself is fully protected against the burdens of the tax.

Section 5719.09, Revised Code of Ohio, as amended, makes provision for the same lien and collection procedures which are applicable to financial institutions having shares, in that the statute expressly provides that taxes assessed on the ownership interests of the depositors in an incorporated financial institution without shares shall be a lien on such ownership interests from the first day of January in each year, and that such financial institution shall collect the taxes due upon the ownership interests of its depositors from such depositors.

Finally, Section 5725.07, Revised Code of Ohio, as amended, expressly requires the Tax Commissioner to ascertain and assess "the taxable ownership interests of the depositors in the capital employed in such incorporated financial institution the capital of which is not divided into

shares" on the basis of the surplus and undivided profits. This statute further provides that the assessment of such ownership interests "shall be deemed to constitute an assessment of the intangible interests of ownership of the depositors in such incorporated financial institution and not an assessment of any of the capital or property of or belonging to such incorporated financial institution."

Thus it can be seen that the objections to the former Ohio statutes which this Court found in *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950, have been removed. This Court noted that the Ohio statutes contained no language expressly imposing the tax on the depositors; that there were no provisions giving the bank the right to recover the tax paid from the depositors; that in the event the bank was unable to pay the tax, the Ohio statutes contained no provision entitling the State of Ohio to collect such tax from depositors; that the statutes failed to relieve a bank from payment of tax on the intangible property interests of the depositor who had withdrawn his account prior to collection date, and if the bank were required to pay on such former depositor's account, the Ohio statutes contained no language providing for reimbursement to the bank from such depositor; and that if the tax were on the depositor the statutes failed to provide a right in the bank to make itself whole from the depositor for the taxes paid on his account. We believe that we have demonstrated herein that these flaws have been corrected in the amended statutes, and that the laws in effect during the Tax Commissioner's assessment were not violative of constitutional protections.

CONCLUSION

It is respectfully submitted that the General Assembly of Ohio, by amendment, fully and adequately conformed the within involved statutes to this Honorable Court's enumerations in the *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950, so that the statutes do not infringe appellant's constitutional liberties. This appeal does not present a substantial federal question, and therefore, the appeal should be dismissed.

Respectfully submitted,

WILLIAM SAXBE,
Attorney General,
JOHN M. TOBIN
Assistant Attorney General,
State House, Columbus 15, Ohio
Attorneys for Appellee.